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*(subject to editorial corrections)**

IN THE COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

ROBERT BLACK

Before: Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ (delivering the judgment of the Court)

[1] The appellant was convicted of the kidnapping and murder of Jennifer Cardy, a nine year old girl, on 27 October 2011. On 8 December 2011 the learned trial judge fixed the tariffs pursuant to the Life Sentences (NI) Order 2001 at 25 years for the murder and 4 years for the kidnapping. The appellant was further ordered to be disqualified from working with children under the Protection of Children and Vulnerable Adults (NI) Order 2003 and was informed that he would be placed on the Children's Barred List under the Safeguarding Vulnerable Groups (NI) Order 2007. The appellant appeals on the ground relating to the admission of bad character evidence with the leave of the single judge and otherwise renews his application for leave to appeal. Mr Spens QC and Mr Taggart appeared for the appellant. Mr Hedworth QC and Ms McColgan QC appeared for the prosecution. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] At lunchtime on 12 August 1981 Jennifer Cardy set off from her home in Lower Ballinderry to cycle to her friend's house 1½ miles away. She never arrived. Her parents reported her missing to the police at 9:10pm and, following a search, her bicycle was found behind a hedge on the road on which she would have been cycling. Despite extensive searches it was not until six days later that Jennifer's body was found in a pond, known as McKee's Dam, behind a layby on the main A1 dual carriageway Dublin to Belfast road near Hillsborough some distance from where her bicycle was found. Post mortem analysis showed ligature compression to her neck

and other features which are present both in strangulation and in drowning victims. The forensic pathologists at trial could not agree on whether the cause of death was by strangulation or by drowning. Examination also showed traces of blood on Jennifer's pants and on swabs from inside her vagina, but the forensic pathologists could also not agree on whether any form of sexual assault had occurred.

[3] The evidence at trial was adduced in two distinct sections: evidence of opportunity, which related to whether or not the appellant was in Northern Ireland on 12 August 1981; and evidence of bad character which related to the appellant's previous convictions for the murder and sexual assault of young girls as well as other sexual behaviour. The judge directed the jury that they must be satisfied beyond a reasonable doubt that the appellant was in Northern Ireland on 12 August 1981 before considering whether the prosecution had proved that it was he who had kidnapped and murdered Jennifer Cardy.

Opportunity

[4] In 1981 the appellant was based in London as a van driver for the company Poster Despatch and Storage Ltd ("PDS"), which delivered advertising posters for billboards, hoardings, and other sites throughout the UK. Drivers of PDS would take batches of posters on regular routes dropping them off with set customers and then returning to London when empty. PDS had a fleet of seven vehicles; five Ford Transits, a Fiat van and a smaller Datsun van. The Datsun van was used for shorter deliveries around the London and East Anglia area, but was also used on runs to Northern Ireland because it did not fall within the commercial vehicle category when buying a ticket for the ferry crossing from Liverpool to Belfast. The ferry charges were also kept low by only travelling on week days and by getting the overnight crossing to Belfast and then getting the return ferry to Liverpool the next night. Normally it was either the appellant or another PDS driver, Michael Carder, who would do the Ireland run.

[5] PDS drivers were provided with fuel agency cards to pay for their fuel. A receipt, dated 13 August 1981, showed the appellant's fuel card was used to refuel the Datsun van at the southbound Service Station at Coventry. A further receipt dated the same day showed the appellant's fuel card was used outside Manchester to refuel a Fiat van. The prosecution case was that these receipts showed the appellant had driven back down to London in the Datsun in the early hours of 13 August having been in Northern Ireland the previous day. He then changed over to the Fiat van and drove up near Manchester in order to do another delivery. Other PDS fuel receipts, however, also showed that on at least five occasions in 1981 the Datsun van was in Northumberland, Leicester and Coventry.

[6] Records from PDS show that they received posters on 3 August 1981 for national campaigns for Tartan Beer and Three Fives cigarettes. These national campaigns were due to commence at the start of September so the prosecution said

that the posters needed to be distributed in Northern Ireland. Recipients would have included Mills and Allen Ltd in the Kilwee Industrial Estate, Dunmurry, and George Hughes and Sons, Newry. The prosecution called evidence from Mr Simmons who said that posters would be delivered in the middle of the month for advertising campaigns due to commence at the beginning of the next month, in accordance with industry terms and conditions which required delivery two weeks in advance. However, the defence pointed out that a receipt for refuelling in Newry by Michael Carder shows he did an Ireland run on 25 August 1981 and two runs would not have been made so close together. They also called evidence from Joanne Grant in Mills and Allen Ltd, who said that posters would only be delivered a week or a couple of days before the commencement of the advertising campaign.

[7] Evidence on this topic was given by Mr Mould. He was interviewed during the trial on 27 September 2011, it having started on 21 September. He stated that there was a dairy council milk promotion that was being advertised on the buses from September 1981 and they needed extra days to get the buses in and apply the posters to their panels weeks before the beginning of the campaign. There were potential penalties for non-delivery. The appellant objected to the admission of the evidence as they had been unable to find anyone in 2011 who could advise them on this point. The learned trial judge refused their application to exclude the evidence.

[8] PDS drivers were paid a bonus for some of the specific runs. The Scotland run attracted a bonus of £77.50, the Manchester run a bonus of £40 and the Ireland run a bonus of £50. The PDS wages book indicated that for the week ended 14 August 1981 the appellant was paid a basic wage of £70 plus a bonus of £50. However, other PDS drivers gave evidence that it was possible that the £50 could be made up by an add-on to a smaller bonus such as overtime for working the weekend. Wage records showed that Mr Radford had received a £50 bonus on two occasions, but he confirmed he only ever did the Ireland run once.

[9] In his police interviews, the appellant accepted that he was a regular driver on the Ireland run. He said he would have made drops in Belfast, Dunmurry and Newry and would normally have been back in Belfast for about 12:30pm in plenty of time for that evening's sailing back to Liverpool. He also said that on outward journeys when the van was full he would stick to motorways but when homebound he would use A and B roads to alleviate the boredom. When asked if the refuelling of the Datsun van at Coventry on 13 August was him returning from an Ireland run, the appellant replied, "As I said, that seems the most likely explanation". In respect of the refuelling of the Fiat van near Manchester on the same day, the appellant said the only logical explanation was that he drove straight from the ferry in Liverpool to London, refuelling at Coventry, changed his van and headed out on a new run. He further accepted that, given the refuelling in Coventry on 13 August and the £50 bonus he received for that week, he would have been in Northern Ireland on 12 August 1981.

Bad character

[10] In July 1990 in Stow in Scotland a member of the public saw a young girl being bundled into the back of a blue Transit van. He immediately alerted police who were able to find and stop the van a short time later. When they searched the van the police found a six year old girl trussed up in a sleeping bag in the back. She had been sexually assaulted. The driver of the van was the appellant. He subsequently pleaded guilty to abduction and sexual assault before Selkirk Sheriff's Court.

[11] The police, however, continued to investigate the appellant and, using the fuel receipts and known runs undertaken by PDS drivers, were able to plot with a degree of accuracy his travels over many years. These investigations led the police to charge the appellant with the abduction and murder of several other young girls throughout the UK.

[12] In July 1982 an eleven year old girl, Susan Maxwell, was abducted from the roadside in Coldstream, Scotland. A white transit van was observed in the area at the time. Her body was eventually found two weeks later dumped behind a layby in the English Midlands. Her underwear had been removed. The records showed the appellant was on the Scotland run and would have driven through Coldstream on the day of the abduction. Further, he was known to visit with friends in the Midlands on his return journeys from Scotland. These friends lived less than twenty miles from where the body was found.

[13] In July 1983 a five year old girl, Caroline Hogg, went missing from a seafront promenade in Portobello, Scotland. The last sighting of her described her as walking hand-in-hand with a man. Her body was found ten days later in a ditch in the English midlands. Her underwear had been removed. The appellant was on the Scotland run on the date of the abduction and his deliveries would have taken him near Portobello. Furthermore, the body was found ten miles from where Black had refuelled in Stafford on his journey back to London.

[14] In March 1986 a ten year old girl, Sarah Jane Harper, was abducted as she walked home from the corner shop in Morley near Leeds. Her body was found three and a half weeks later in the River Trent near Nottingham. She had been sexually assaulted both vaginally and anally. Records indicated the appellant would have been making a delivery less than 150 yards from where the girl lived on the day she went missing.

[15] In April 1988 an attempt was made by a driver of a van to abduct a girl in Nottingham. However, despite only being four feet ten inches tall, and thus looking much younger than her true age, the girl who was in fact fifteen years old was able to fight off her would be abductor. Records showed the appellant would have been making a poster delivery less than five hundred yards from the scene on that day

and would have been driving the same make, model and colour of van as described by the girl.

[16] The appellant was placed on trial for all of these offences at Newcastle-Upon-Tyne Crown Court in May 1994 and was convicted. The appellant had two further relevant previous convictions. At the age of sixteen he was convicted of interference with a girl and, at the age of nineteen, he was again convicted of interference with a girl, this time when he was babysitting.

[17] During police interviews in 2005, the appellant admitted to having sexual fantasies about young girls between the age of eight and twelve. He described in detail fantasies which included penetration of the girl's vagina with either his finger or a pen or pencil, covering her head with a sleeping bag or a jacket before masturbating over her and also having full sexual intercourse with the child without it hurting her. He also admitted to having fantasies in which he would abduct the girl. He further admitted to watching children and fighting the urge to carry out his fantasies. The appellant also admitted to the possession of child pornography, both magazines and videos, which included girls penetrating themselves with pencils, and said he would have used them to masturbate. In relation to a girl's swimming costume and a coke bottle found in his van when he was arrested in Scotland in 1990, the appellant admitted that he would dress up in women's and girl's clothing to masturbate and would also insert the coke bottle and other items into his anus.

The contentions of the parties

[18] The appellant had not taken issue at the trial with the admission of the bad character evidence as similar fact evidence but now argued that in fact the evidence was not capable of being similar fact evidence which identified the appellant as the person who carried out the murder. Mr Spens submitted that there was no other evidence at all of identity. This was a weak prosecution case and in light of the remarks of Lord Justice Rose at paragraph 10 of R v Hanson [2005] 1 WLR 3169 the evidence of bad character should not have been omitted.

[19] This submission was related to the submission that the case should have been withdrawn from the jury at the end of the Crown case. Clearly if the submission about the inability of the similar fact evidence on its own to constitute evidence of identity was correct it would follow that the case should have been withdrawn. If, however, it was accepted that similar fact evidence on its own could constitute evidence of identity it was submitted that it was not sufficient in this case principally because of the dissimilarities between this case and elements of the previous offences. Mr Spens submitted that there had been no case he could find in this jurisdiction or in England and Wales since the commencement of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004 Order) where bad character evidence on its own was sufficient to establish identity. He accepted that R v Straffen [1952] 36 Cr App R 132 and R v Smith [1915] 1 Cr App R 132 were cases

where similar fact bad character evidence was used to establish identity. Mr Hedworth added to that list the decision of the Court of Appeal in the appellant's own appeal from the Newcastle convictions reported at [1995] Crim LR 640.

[20] The next ground related to the admission of evidence of the appellant's self-abuse. When he was arrested in 1990 police discovered items in his van which the appellant used as sexual aids. These included small items such as pencils which the appellant admitted he fantasised about inserting into a child's vagina. In interview when describing his fantasies he also referred to his use of larger items such as bottles which he used on himself. The learned trial judge admitted this evidence as it was so bound up with his fantasy evidence but did not admit photographs of the items. The decision to admit the evidence about the larger items was challenged as they were not relevant to any issue the jury had to consider but were very prejudicial.

[21] The appellant also argued that the learned trial judge ought not to have admitted the evidence of Mr Mould as the appellant did not have a fair chance to contradict it. That evidence was highly material to the evidence of opportunity. On appeal the appellant submitted that the evidence of opportunity was insufficient in the circumstances to sustain proof beyond reasonable doubt that the appellant was in Northern Ireland on the day of the abduction. Finally although he made some general criticisms of the summing up of the learned trial judge Mr Spens sought leave during the hearing to pursue a ground that the judge failed to direct the jury adequately in particular in respect of the similar fact evidence which had been adduced to prove identity. That related to the extent to which it was necessary to explain to the jury what the learned trial judge meant by describing the similarities between this case and the others as a signature and the significance he directed the jury should give to the dissimilarities.

The bad character evidence as similar fact evidence

[22] The policy of the common law in relation to the admissibility of bad character evidence is based upon the judgement of Lord Herschell in Makin v Att-Gen for New South Wales [1894] AC 57.

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant

> to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

[23] In R v Straffen [1952] 36 Cr App R 132 the allegation was that the appellant murdered a little girl during the period of his escape from Broadmoor. The deceased had been killed in the vicinity during that period of escape and the appellant had no explanation for his movements. He was interviewed by police the following day after re-capture and expressly denied that he had murdered the girl. The prosecution relied on this interview as it was contended that he had introduced the assertion that the girl had been murdered and he could not have known of the murder unless he had committed it. In support of the prosecution case the judge admitted evidence of a confession by the appellant that he had manually strangled two other little girls in extremely similar circumstances the year before. There were a number of similarities shared by these crimes.

> ".. first, that each of the victims was a young girl; secondly, that each of the young girls was killed by manual strangulation; thirdly, that in each case there was no attempt at sexual interference or any apparent motive for the crime; fourthly, that in none of the three cases was there any evidence of a struggle; and fifthly, that in none of the three cases was any attempt made to conceal the body, although the body could have been easily concealed."

The Court of Appeal accepted that the evidence was properly admissible in accordance with the principle in Makin as evidence of identity for the purpose of proving that the appellant was the person who had committed the murder rather than general evidence of his conduct and character.

[24] The House of Lords examined the principle behind the admissibility of such evidence in DPP v Boardman [1975] AC 421. The appellant was the headmaster of a boarding school who was charged with buggery of a pupil aged 16 and inciting another pupil aged 17 to commit buggery on him. The trial judge directed the jury that they could use the evidence on the first count as corroborative evidence on the second count and vice versa. The House of Lords accepted that there were circumstances in which, contrary to the general rule, evidence of criminal acts on the part of an accused other than those with which he was charged became admissible because of their striking similarity to other acts being investigated and because of their resulting probative force. The principle was stated by Lord Wilberforce in the following terms.

> "The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other(s)."

[25] The House revisited the issue in DPP v P [1991] 2 AC 447. The appellant was charged with rape and incest against each of his two daughters. The judge refused his application that the counts relating to each girl should be tried separately and he was convicted on one count of rape and each of the incest counts. The Court of Appeal allowed the appeal because the evidence of the girls did not demonstrate striking similarity. The prosecution appealed on the basis that Boardman did not require a striking similarity test. The judgement of the court was given by Lord Mackay and his reasoning is contained in the following passage.

> "As this matter has been left in Reg. v. Boardman I am of opinion that it is not appropriate to single out "striking similarity" as an essential element in every case in allowing evidence of an offence against one victim to be heard in connection with an allegation against another. Obviously, in cases where the identity of the offender is in issue, evidence of a character sufficiently special reasonably to identify the perpetrator is required and the discussion which follows in Lord Salmon's speech on the passage which I have quoted indicates that he had that type of case in mind."

From all that was said by the House in Reg. v. Boardman I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed and the authorities provide illustrations of that of which Reg. v. Straffen [1952] 2 Q.B. 911 and Rex v. Smith (1915) 11 Cr.App.R. 229, provide notable examples."

[26] The important features of this passage in relation to this case are the acceptance that such evidence may be used for the purpose of establishing identity and that the test is whether the evidence is of a character sufficiently special reasonably to identify the perpetrator. This line of authority was then applied in relation to the trial of this appellant in 1994 at Newcastle Crown Court. The prosecution introduced evidence of the circumstances of the offence admitted by him at Stow and referred to at paragraph 10 above in his trial for the commission of the three murders of young girls and the kidnapping of a fourth. The prosecution prepared a schedule of similarities in respect of the attacks and the Court of Appeal concluded that the evidence was admissible to establish that all of the offences were committed by the same man. Although the Court of Appeal noted the evidence of opportunity in each case its decision proceeded on the basis that the only evidence of identity in the three murder cases was the bad character evidence. Subject, therefore, to the issue of whether the similarities were of a character sufficient reasonably to identify the perpetrator the bad character evidence in this case would have been admissible at common law to identify the offender even if it was the only evidence of identity.

[27] The 2004 Order created a new statutory regime governing the admissibility of bad character evidence. The common law rules on admissibility were largely abolished. By virtue of Article 6(1) bad character evidence is admissible if but only if it falls within one of seven categories. One of those categories, in Article 6(1)(d), is that the evidence is relevant to an important matter in issue between the defendant and the prosecution. In this case the important matter in issue upon which the prosecution relied was the issue of the identity of the offender. Article 6(3) provides that that where the ground of admissibility is under paragraph (d) the evidence must not be admitted if, on an application to the court, it appears that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to do so. There are further provisions about admissibility in Article 8 where the ground of admissibility is related to propensity. For the purposes of this case those provisions add nothing to the Article 6(3) test.

[28] The Court of Appeal in England and Wales gave guidance on the equivalent provisions in that jurisdiction contained in the Criminal Justice Act 2003 in R v Hanson [2005] 1 WLR 3169. The court examined the admissibility of previous convictions under section 101(1)(d) at paragraph 6 with particular emphasis on the new provision dealing with the admissibility of propensity evidence. Mr Spens drew our attention in particular to paragraphs 9 and 10.

> "9. There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or

category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged: compare Director of Public Prosecutions v P [1991] 2 AC 447 , 460-461. Child sexual abuse or fire setting are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting, will not, without more, be admissible to show propensity to steal. But if the modus operandi has significant features shared by the offence charged it may show propensity.

10. In a conviction case, the decisions required of the trial judge under section 101(3) and section 103(3), though not identical, are closely related. It is to be noted that the wording of section 101(3)-"must not admit"-is stronger than the comparable provision in section 78 of the Police and Criminal Evidence Act 1984-"may refuse to allow". When considering what is just under section 103(3), and the fairness of the proceedings under section 101(3), the judge may, among other factors, take into consideration the degree of similarity between the previous conviction and the offence charged, albeit they are both within the same description or prescribed category. For example, theft and assault occasioning actual bodily harm may each embrace a wide spectrum of conduct. This does not however mean that what used to be referred to as striking similarity must be shown before convictions become admissible. The judge may also take into consideration the respective gravity of the past and present offences. He or she must always consider the strength of the prosecution case. If there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are."

[29] We entirely accept the helpful exposition of the approach to propensity evidence in this passage but we consider that the fourth sentence in paragraph 9 (underlined) is apt to confuse if taken out of context. Evidence introduced where the circumstances demonstrate probative force in relation to the identity of the offender is not to be confused with evidence that is introduced solely as propensity evidence

in order to establish a disposition to commit offences of this type. In the latter case if there is little or no other evidence against the defendant it is unlikely to be just to admit it. That is because the prejudicial effect of alerting the jury to the previous bad character of the defendant will usually outweigh any probative value by way of propensity. If, however, the evidence is of a character sufficiently special reasonably to identify the offender its probative value is likely to be high and accordingly make it just to admit it and indeed make it quite unjust to exclude it. We do not accept, therefore, the submission that such identity evidence should be excluded in the absence of other evidence of identity and we find no support for the proposition that the provisions of the 2004 Order changed the law by prohibiting bad character evidence on its own from constituting, in appropriate circumstances, evidence of identity.

[30] In support of the prosecution case Mr Hedworth relied on 13 elements which he contended cumulatively amounted to evidence highly probative of the identity of the offender.

> "i. Each victim was abducted at a time when Robert Black is in the area in connection with his employment driving his PDS van. This is really evidence of opportunity.
>
> ii. Each victim was prepubescent except the girl in Nottingham who looked as if she was.
>
> iii. Each offence was committed during school holidays.
>
> iv. Each victim was abducted from a public place.
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> v. Each victim was wearing white socks.
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> vi. In each case, a vehicle was used to carry the victim away.
>
> vii. Each victim was carried in the direction of Robert Black's return to London.
>
> viii. Each victim was sexually assaulted or we can infer, was to be sexually assaulted. This was disputed in this case.
>
> ix. Each victim was killed, except for the girls in Stow and Nottingham who were rescued.

x. None of the victims was grossly injured.

xi. In all cases, except for the girl in Nottingham who escaped, there is evidence of disturbance of clothing. This was in issue in this case. As well as the possibilities of interference with the underpants there was also a cardigan missing.

xii. In all cases, except for the girl in Nottingham who escaped and Sarah Harper who was disposed of not far from one, a lay-by was involved.

xiii. Sarah Jane Harper had also been placed in water."

[31] Mr Spens took issue with some of these features. In relation to the evidence of opportunity in each of the other cases there was evidence that the point of abduction was no more than 500 yards from the delivery route. In this case the point of abduction was 8 miles from the nearest point of the Newry/Belfast road. This issue was more a matter of opportunity than similarity. Secondly the evidence of sexual assault was disputed. There was no evidence of injury to the vulva although it was suggested that as a result of the post mortem it was not now possible to confirm that. There was a dispute as to whether the findings in the vagina were the result of interference or decomposition. There was staining on the outside of the gusset of the underpants but no agreement as to whether this was blood or post mortem fluid. Related to this was the issue of whether the victim had been redressed which would explain why the staining was on the outside of the gusset. Unlike some of the other cases there was no evidence of mouth restraint.

[32] There were 2 further features upon which Mr Spens laid particular emphasis. In all the other cases the victims had been dressed in shorts or dresses. In this case the child was wearing trousers. It was common case that the trousers would have left the victim's white socks visible. Secondly in all the other cases the victim's shoes had been removed. In the Stow case the shoes had been recovered although not in the other cases. In this case the shoes had not been removed. Mr Hedworth pointed out that this case was the first in time although the last to be prosecuted and it was entirely consistent that the offender learned to remove the shoes in order to limit the opportunity to escape in the later attacks. This point was not, however, advanced before the jury.

[33] Mr Hedworth also relied on the evidence that in Northern Ireland there had been 15 cases of unlawful killing of pre-pubescent children in the last 40 years. This was the only case where a pre-pubescent girl had been abducted from a public place, transported by a vehicle and killed. This, he argued, was the signature of this

appellant who had committed such murders in July 1982, July 1983 and March 1986. It was submitted that he had tried to carry out similar attacks in April 1988 and July 1990.

[34] In his submissions in the trial Mr Spens submitted that the judge should first allow the opportunity evidence to be introduced and if the court concluded that it was non-existent or weak the case should be stopped. He recognised, however, that the prosecution relied on the account given by the appellant at interview as a confession rather than simply bad character evidence and also relied on the bad character evidence flowing from the convictions as evidence of identity. The learned trial judge accepted that the opportunity evidence should first be called. He concluded that it would be unjust and unfair to admit the bad character evidence unless opportunity was established. That could only have been to the benefit of the appellant. In his ruling on 7 October 2011 the learned trial judge concluded that there was evidence on which a jury, properly directed, could conclude that the appellant was in Northern Ireland on 12 August 1981. He admitted the bad character evidence because he held that it established propensity and made it more likely that the appellant was the person who committed the offences. He rejected the submission that it would be unfair to do so and accepted that it would be necessary to give the jury clear direction on how they should approach the issues. In his charge he directed the jury to consider first if they were satisfied beyond reasonable doubt that the appellant was in Northern Ireland leaving out of account the bad character evidence. If they were not so satisfied they were directed to acquit.

[35] We consider that the approach taken by the learned trial judge was if anything more beneficial to the appellant than was necessary. The bad character evidence was clearly relevant to an important matter in issue namely the identity of the offender. The extent of the similarities and the context of the offence as the only one of its type in Northern Ireland reinforced that. This was clearly relevant evidence to which the jury were entitled to attribute high probative value. We do not consider that the dissimilarities undermined materially the strength of the evidence of similarity. The direction given by the learned trial judge that the jury had to be satisfied beyond reasonable doubt about opportunity before considering the bad character evidence ensured that there was no possible injustice. We consider that this evidence was properly admitted.

The admission of the evidence of self-abuse

[36] We have set out the general nature of the self-abuse evidence at paragraph 17 above. At the trial Mr Spens did not take issue with the admissibility of the fantasy evidence relating to the smaller items the appellant talked about inserting into children and the evidence indicating the recovery of such items from the van at Stow. That was clearly material to the issue of the intent of the appellant to commit a sexual assault. He did, however, take issue with the admissibility of the evidence indicating the use by the appellant of larger items which he inserted in himself and

which were also found in the back of the van at Stow. There was no suggestion that those items played any part in the assault of any of his victims.

[37] The learned trial judge first considered this evidence on 21 September before any opportunity evidence was given. Although he ruled that none of the bad character evidence should be admitted at that stage he took the view that the evidence of inserting objects into children and similar behaviour with larger objects on himself was so inter-mixed that both should be admitted if the necessary opportunity evidence was forthcoming. He returned to this on 12 October after the opportunity evidence had been heard. He concluded that this evidence was one of the similarities with the Stow offence and ought not to be excluded.

[38] One of the issues in the trial advanced by the prosecution was that a sexual assault had been committed on the child by the offender. The fantasy evidence and the smaller items found in the van at Stow were clearly material to the prosecution case that the fantasy evidence was an admission that such an assault had been carried out. The larger items were not concerned directly with any assault on the child but together with the evidence relating to the smaller items assisted the prosecution case that the appellant had at all times the same unusual sexual predilections about the insertion of objects into the body which made it more likely that he had sexually assaulted the child.

[39] The second feature of this evidence relied upon by the prosecution was the contention that the description of self-abuse by the appellant was an indication by him of what he actually did. The prosecution relied upon this to support their case that the fantasy evidence similarly was evidence of what he had done. We consider, therefore, that the evidence was relevant. No argument was advanced that the use of the larger items on himself was not bad character evidence. In the circumstances of this case we need not decide that issue. We agree that in the context of the case this evidence was not central to the determination but we can see no error in the judgment that the admission of the evidence was not unjust.

The evidence of opportunity

[40] We can deal briefly with this issue. The prosecution case was that the posters had to be delivered to Northern Ireland by 15 August which was the in charge date by which the appellant's employers were bound. This was disputed at the trial by witnesses who said that the posters were often late. The records of the employers showed that the appellant had received a £50 bonus that week which corresponded with the bonus payable for the Northern Ireland run. Such a bonus could, however, have been made up from other runs. The appellant had been driving the Datsun vehicle owned by his employers on 13 August when the vehicle was refuelled at a service station which was consistent with a return from Northern Ireland that morning. Indeed when this was put to him the appellant agreed that he must have been in Northern Ireland on 12 August. At trial it was submitted that the location of

the service station had been wrongly identified. Finally there was the evidence of Mr Mould which was served after the trial had commenced.

[41] All of these strands including the appellant's admission constituted a formidable case supporting the conclusion that the appellant was in Northern Ireland on the day of the abduction. The evidence of Mr Mould was part of that and since this trial inevitably looked at events many years after they occurred it was necessary to ensure that the jury recognised those difficulties that the defence may have faced and the disadvantages flowing from that. There was, however, no reason to exclude the evidence and no basis to withdraw the case from the jury on the issue of opportunity.

The learned trial judge's charge

[42] The first criticism of the charge was the failure to direct the jury as to what was meant by the term "signature". The learned trial judge used the term first when after reviewing the similarities he indicated that the prosecution relied on these as a signature. He then reviewed the dissimilarities before inviting the jury to consider both similarities and dissimilarities in concluding whether this was a signature. Mr Spens points out that he did not at any stage indicate what he meant by the use of the term. That submission has to be seen, however, in the context of the trial as a whole. At the start of his closing speech Mr Hedworth identified the prosecution case as relying on the unique aspects of this case in the context of Northern Ireland and the similarities with other cases to establish that those features bore the appellant's signature and demonstrated that he was the killer. He returned to the same use of the term at the end of his closing speech when he described these features as a signature or hallmark. In those circumstances the jury could have been in no doubt about the meaning of the term when used by the judge.

[43] There is no complaint that the learned trial judge failed to alert the jury to the matters upon which the appellant relied as evidence of dissimilarity. It was submitted, however, that he should have specifically reminded them of the significance of these dissimilarities and the consequence of a finding that any similarity was not established by the prosecution. The learned trial judge reminded the jury to have regard to the absence of shoes as a very telling aspect upon which the appellant relied. That was the primary matter to which the submissions of the appellant had been directed in respect of the undisputed evidence. That could only have been considered by the jury as a direction to assess whether this mark of distinction was with the other matters sufficient to create a doubt about the signature.

[44] The disputed aspect of the signature evidence was the evidence of sexual assault introduced by Dr Carey. This was carefully reviewed by the trial judge and it is clear that there was a considerable difference of view between the experts on this which was properly put before the jury. It is, however, important to remember that

the prosecution case did not depend on the scientific evidence alone as there was also evidence of alleged admissions by way of the fantasy evidence. All of this was reviewed in the context of the central contention between the parties as to whether the evidence showed that the appellant was the killer. We consider that the direction was apt in the circumstances and accordingly do not accept Mr Spens' submission that the direction of the learned trial judge on these issues fell below the irreducible minimum that was required in this case. We also note that no requisition on these matters was made at the trial.

Conclusion

[45] For the reasons given we do not consider that any of the grounds of appeal have been made out. We do not consider that the conviction is unsafe. The appeal is dismissed.